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## PRESIDENT FORD'S INTELLIGENCE PROPOSALS: A CHARTER FOR ABUSE

*"I think a President ought to be accountable. And what we have sought to do in this case is to make the process and the decision-making fall on the shoulders of the President and he will be held accountable by the American people."*

President Gerald Ford  
February 17, 1976

*"One of the problems, of course, is that all of these proposals are basically incorporated in Executive Orders which are not law and can be changed within minutes. I am far more concerned about what appears to be a strategy to resist true accountability to the Congress."*

Senator Walter Mondale (D-Minn)  
CBS News, February 18, 1976

On February 18, 1976, President Gerald R. Ford unveiled his program to reform the foreign intelligence agencies. Billed as the "first major reorganization of the intelligence community since 1947," the President's proposals have three separate elements: an Executive Order which outlines charters and restrictions on the intelligence agencies; legislative proposals on secrecy and oversight; and procedures to make the agencies accountable to the President.

The President's Executive Order goes into effect immediately, and his legislative proposals will be the center of congressional and public debate in the coming months. This *Intelligence Report* provides a detailed review of the President's program and its implications.

It should be remembered that the President's proposals were occasioned by revelations of massive illegal domestic activities by each of the major intelligence agencies - the Central Intelligence Agency (CIA), the Federal Bureau of Investigation (FBI), the National Security Agency (NSA) and the military intelligence agencies. Each of these sponsored extra-legal surveillance programs targeted on Americans. Each engaged in activities — break-ins, burglaries, mail opening, wiretaps — which violated criminal statutes and the constitutional rights of American citizens. These abuses have been revealed in the press and confirmed by Presidential and Congressional investigations. The President's program represents his response to the revelations.

### EXECUTIVE ORDER: RESTRICTION OR LICENSE?

The centerpiece of the President's program is a 32-page Executive Order which restructures the management of the intelligence agencies and places restrictions upon what they can do. Both the form and substance of the order are of significance.

### The Use of Higher Orders

Instead of proposing legislated charters and restrictions, the President chose to issue an Executive Order, emphasizing what he called "his constitutional responsibilities" to manage the intelligence agencies. An executive order differs from legislation in several ways. It is not debated publicly in open hearings, but drafted quietly within the executive branch. A formal expression of "superior orders," it provides no criminal penalties for its violation. Moreover, an executive order can be modified with the stroke of any president's pen. If desirable, it can be altered by secret directives about which neither the public nor the Congress need be informed. The President's Order itself contains only a portion of the new instructions, the remainder - particularly the guidelines for NSA - have been issued in

*"This is not a government of executive orders . . . this is a government of laws and these basic laws should be written by the Congress to set certain limits on the operations of these very powerful and secret agencies. . . ."*

Senator Frank Church (D-Idaho)  
NBC News, February 18, 1976

The President's Order illustrates the fragility of limits issued without legislation. It apparently repeals - without acknowledging it - one of the few existing restrictions on the CIA. In 1967, when it was revealed that the Agency had had secret dealings with the National Student Association, foundations and universities, President Johnson issued an Executive Order prohibiting the Agency from providing "covert financial support" to any educational or voluntary organization. The new order permits such secret dealings with the single proviso that, in the case of universities, college officials must be informed about the arrangements.

The relationship of the executive order to ordinary law is also unclear. The President's Order contains a remarkable section which states in so many words that wiretaps, burglaries ("unconsented physical searches"), examination of tax returns, and opening of mail "in the United States postal channels" shall be carried out only according to existing regulations and laws. The implication is that other techniques are not limited to "lawful" methods or applicable regulations. Mail not in U.S. postal channels, for example, apparently can be opened in violation of law.

The broader suggestion is that statutes and regulations do not apply to intelligence officials unless reaffirmed by the President in an executive order. This presumption is present elsewhere in the Executive Order. For example, the law establishing the CIA prohibits it from "domestic law enforcement or internal security functions." The President's Order authorizes the CIA to engage in a broad range of domestic activities targeting foreigners and Americans alike, apparently superseding the congressional intent by ratifying the Agency's previously bureaucratic practice. In the past, intelligence officials have by their own admission operated on the assumption that they were above the law. (See section on Accountability to Law, page 7) The impression left by the President's Order may not simply be a matter of poor draftsmanship, but one of intent.

Recourse to an executive order has policy implications also. Since it is not publicly debated, only a handful of executive officials take part in the drafting. In this instance, the order was drawn up by representatives of the very agencies it claims to restrict - senior officials of the foreign intelligence community. These officials were prepared to accept limitations proposed by the White House subject only to a few "reasonable exceptions to permit them to

"do the job" and protect our national security. In return they asked for and received the criminal penalties for "leaks" which they had long sought.

The influence of intelligence officials in the drafting process was particularly significant since, according to President Ford, the order is intended to "balance" the interests of the intelligence agencies against the "privacy and civil liberties" of American citizens. The latter might have fared better had they been represented in the process. In his nationally televised press conference, the President referred to the order as providing "stringent protections of the rights of American citizens." Only the next day, when the order was released and the fine print could be deciphered did it become clear that far from protecting constitutional rights, the order actually authorizes most of the abuses of the past.

## The Restrictions

The President's Executive Order defines a series of "restrictions," broad prohibitions followed by "exceptions." Each agency apparently sought and for the most part received the exceptions it believed necessary to protect its on-going operations. The largest is accorded to the Federal Bureau of Investigation which is simply exempted from the section altogether. Thus, the new restrictions on surveillance of Americans at home do not apply to the one agency generally thought to be the only one free to operate in the United States. The President's order is directed only at the *domestic* activities of the *foreign* intelligence agencies.

### 1947 CONGRESSIONAL FEARS

*"I am not interested in setting up here in the United States any particular central police agency under any President, and I do not care what his name may be, and just allow him to have a gestapo of his own if he wants to have it."*

— Rep. Clarence Brown (R-Calif.)  
Hearings of the House Committee  
on Expenditures in Executive  
Departments, April 1-July 1, 1947  
p. 127

The Order prohibits the foreign intelligence agencies from "collection of information, however acquired, concerning the *domestic activities* of United States persons *except . . .*" (emphasis added). The exceptions authorize collection of information on the following categories of Americans:

- persons "reasonably believed to be acting on behalf of a foreign power . . ."
- anyone, if the information comes from foreign intelligence gathered abroad, electronic surveillance abroad, or foreign intelligence sources in the United States.

Together these clauses would authorize many of the activities undertaken by the CIA in Operation CHAOS, which claimed to be reporting on "foreign contacts with American dissidents," yet ended up infiltrating agents into "dissident groups" and compiling some 3,000 files with over 300,000 names of individuals and groups. Any citizen whose domestic activities are picked up in the foreign intelligence collection process is fair game for the CIA or military intelligence agencies.

- persons who "pose a clear threat to foreign intelligence agency facilities or personnel."

The same justification was invoked by the CIA's Office of Security when it infiltrated ten separate domestic groups in Washington, D.C., including the Women Strike for Peace and the Washington Peace Center. The military intelligence agencies used a similar rationale to infiltrate domestic anti-war groups active near military bases or ports.

- "present or former employees, present or former contractors or their present or former employees, or applicants for any such employment" . . . and "the identity of persons in contact with the foregoing . . ."

The breadth of this exception is best revealed by the Rockefeller Commission which found that the CIA's Office of Security alone maintained over 900,000 security files, cross-indexing the names of over 900,000 Americans, including 75 sitting members of Congress. Some were maintained on persons totally unaware they had any relationship with the Agency. The President's Order reaffirms the CIA's right to contract secretly for supplies and material, and thus to surveil employees who are not aware of the identity of their true employer.

- persons who are reasonably believed to be "potential sources or contacts."

This establishes the right of the CIA and other agencies to run a security check on persons who may have no interest in or relationship to the Agency - as a "potential" source or contact. The Rockefeller Commission reported that the files produced by such investigations were maintained within the CIA - even if the persons were never contacted about employment. President Nixon used a similar authority to run a security check on CBS reporter Daniel Schorr in an apparent attempt to intimidate him.

## Limits on Techniques

The "restrictions" section also limits the surveillance techniques of the agencies. As noted above, many of the restrictions - on mail opening, tax return intrusion, and break-ins - simply prohibit what is already unlawful. Other techniques included are:

- a ban on "physical surveillance" (tailing, overhearing), with a broad exception for present and former employees, contractors and those in contact similar to that detailed above. This broad grant of authority would

issued by William Colby which provided that "no surveillance . . . will be conducted against employees or ex-employees of the Agency outside Agency property."

- authorization for foreign intelligence agencies - except the CIA, which is prohibited - to engage in electronic surveillance within the United States with the approval of the Attorney General. The directive apparently revokes a 1967 Presidential directive limiting domestic electronic surveillance to the FBI.
- authorization for domestic COINTELPRO-type operations against organizations in the United States whose members are "primarily" foreigners associated with a foreign government. COINTELPRO was the FBI's massive program to infiltrate and disrupt domestic organizations. The President's Order authorizes the *foreign* intelligence agencies to infiltrate for the purpose of "influencing" groups - Arab student groups for example - fitting the above category.

## NSA: Reading the Fine Print

Perhaps the best example of the effect of the President's Order is provided by the National Security Agency. NSA has the task of making and breaking codes of all kinds and intercepting all messages in the air - "signals intelligence." Like other intelligence agencies, NSA has had its own domestic program. With the cooperation of the cable companies it has been scanning all of the cable traffic leaving the United States since the end of World War II. Of late, its emphasis has apparently been on "economic intelligence." NSA has been reading cables sent abroad by American business firms to learn what it could about economic conditions and transactions of foreign countries with American corporations.

The President's Executive Order authorizes such interceptions with few realizing what is going on. The paragraph appears in the section labelled "Restrictions on Collection" which begins as follows: "Foreign intelligence agencies shall not engage in any of the following activities." Item (7) in the list reads: "Collection of information, however acquired, concerning the domestic activities of United States persons except" and then in the first exception comes the authority sought by NSA: "information concerning corporations or other commercial organizations which constitutes foreign intelligence or counter-intelligence." The list of definitions reveals that foreign intelligence means "information concerning the capabilities, intentions and activities of any foreign power, or of any non-United States person, whether within or outside the United States, or concerning areas outside the United States." Put together and translated into English, one learns that NSA is authorized to monitor the overseas cable traffic of Americans for the purpose of learning about their dealings with foreign governments or companies, their activities in

foreign countries, and the information that they may have obtained concerning foreign countries.

The President's Order states that nothing in the restrictions section shall "authorize anything previously unauthorized." But the Order sanctions on-going programs

which were considered extra-legal when first revealed, and which have continued pending review. The President's Order may solve the problem of domestic abuses by the foreign intelligence agencies in the past by making them legal in the future.

## THE PRESIDENT'S ACCOUNTABILITY PROPOSALS: BLANK CHECKS AND IMBALANCES

To protect U.S. citizens against the ambitious and the venal, the American political order is designed to insure that Executive officials are accountable - to the Congress, the public, and the law. The clandestine intelligence agencies pose a severe challenge to this precept, for their operating principle is one of secrecy from outside inquiry.

The classification stamp has been used with equal facility to conceal unconstitutional and illegal activities as well as *bona fide* national security secrets. The temptation to hide errors or mistakes and to "cut corners" under a cloak of secrecy is common to all administrations and bureaucracies. The widespread domestic abuses of the foreign intelligence agencies illustrate the dangers posed by unaccountable Executive agencies which operate in secret.

In the past, four different mechanisms served - with greater or lesser success - to provide some check on the secret license of the intelligence community: publicity and exposure in the press; oversight and appropriations by the Congress; personal accountability to the law; and internal controls within the Executive itself. The President announced that his proposals were designed to establish "clear lines of accountability." The question is, accountable to whom? The President's program is clearly designed to reduce the scope of any horizontal accountability - to the public, the Congress, or the law - while increasing Executive authority, implying that Executive "self-discipline" alone will suffice to protect us from future abuses.

Congress, it is precisely at such moments that information must be available so that a serious review can proceed. As Anthony Lewis has pointed out, the marketplace of ideas is fairly well protected. It is access to facts that is severely restricted. (*Issues Magazine*, Fall 1975).

High government officials do not, as a rule, enjoy such revelations, which they term "leaks". Too often, they are responsible for the illegal or unpopular programs thereby revealed. Secretary of State Kissinger, in fact, scornfully refers to those who reveal information as "soreheads." (*Washington Post*, 2/6/76). As the House Select Committee on Intelligence reported, the secrecy system is also used by senior officials - Henry Kissinger is the master of the art - for "manipulation of the news" through selective declassification. Lower-level leaks - such as those which revealed the true extent of American involvement in Angola - can undermine the Executive's attempts to distort reality in order to prevail in the domestic debate.

### PUBLIC ACCOUNTABILITY: SECRECY AND THE PRESS

A major check on the abuses of the intelligence agencies in recent years has been public exposure in the press. Press reporting of the My Lai massacre, CIA's funding of the National Student Association, the FBI's COINTELPRO, and the CIA's Operation CHAOS - all served to expose illegal activities previously hidden beneath the secrecy stamp.

These stories have often come from information provided to reporters by courageous middle-level bureaucrats who risked their careers in order to "blow the whistle" on abuses which might otherwise have continued unchecked. In recent years, many of the revelations reflect the end of the Cold War consensus about American foreign policy. The CIA's secrecy system was self-enforcing for over twenty years. Only when the Agency's activities abroad came under widespread public criticism did some of its officials - undergoing a personal reappraisal matching that of the public - begin to reveal its abuses. For the citizenry, and for



President Ford and Secretary Kissinger have repeatedly decried the "dangerous exposure" of intelligence secrets. Yet neither have pointed to a single leak which has damaged the national security. When Secretary of State Kissinger was asked by Senator Lowell Weicker to list any national security matters that had been compromised during the year of Congressional investigations, he declined to answer in public session. Summing up disclosures about U.S. covert involvement in Angola, Iraq, Italy, and Chile, the Senator charged, "I would characterize them as a national shame, rather than a national secret." (*New York Times*, 2/6/76)

#### WHAT HURTS INTELLIGENCE?

*"The illegal operations of the U.S. Government in Chile have probably done more harm to our intelligence capabilities and indirectly exposed more intelligence operatives than all the leaks of intelligence. The corrective here is not burying such abuses in secrecy but in avoiding their repetition."*

—Herbert Scoville, Jr.  
former Assistant Director for  
Scientific Intelligence, CIA  
*Washington Star-News* 2/29/76

Yet, Administration spokesmen have repeatedly attempted to change the focus of the recent investigations from official crime to keeping secrets. Thus, when the CIA's Operation CHAOS was revealed, CIA Director William Colby, while admitting many of the allegations, responded by calling upon Congress to pass an official secrets act. When the FBI's illegal domestic programs were unearthed, FBI Director Clarence Kelley warned that investigations and possible restrictions could cripple law enforcement intelligence "in a hysteria of reverse McCarthyism." (*Hearing before the Civil Rights and Constitutional Rights Subcommittee of the House Judiciary Committee*, "FBI Counterintelligence Program", November 20, 1974, p. 47). It is therefore not surprising that Mr. Ford's package includes a series of proposals directed not at the officials who abuse their authority, but at those who revealed the misdeeds to the public.

#### Pledge of Allegiance

The Administration's reforms seek to shore up the secrecy system, rather than address the abuses of that secrecy. The Executive Order requires - as a condition of employment - that Executive branch employees and contractors sign an agreement not to disclose information dealing with "sources and methods of intelligence" - regardless of whether the information is classified correctly, whether its release will do harm to the national security, or whether it concerns official illegality. Since Executive officials already sign agreements not to release classified information, this provision serves primarily as a ritualistic reaffirmation of the secrecy system after a period of leaks. On March 1, 1976, tens of thousands of employees will have repledged their allegiance to keeping secrets.

wording of the CIA's secrecy pledge is extended to cover every intelligence agency - thus uniting all in the most restrictive agreement.

#### Official Secrets Act

President Ford recommends legislation for an Official Secrets Act which would provide criminal penalties - up to five years sentence and/or a \$5000 fine - for disclosing "information relating to intelligence sources and methods." Although seemingly a restricted term, recent history proves that "sources and methods" is susceptible to dangerously expansive application. As the House Intelligence Report noted:

Existing standards for classifications are vague, arbitrary, and overused. Almost anything can be a "source" or "method" of intelligence - which are the primary criteria for foreign intelligence classifications. As a result, the sources and methods by-line is used to classify items that have practically no bearing at all on intelligence, but were extremely embarrassing.

Richard Nixon used this rationale to temporarily deflect an FBI investigation of CREEP money laundered in Mexico - the investigation, he claimed might compromise CIA sources. More recently, the CIA argued in a Freedom of Information Act case that the release of a single gross budget figure of the CIA would also jeopardize sources and methods. Perhaps the logical absurdity was faced by the House Committee on Intelligence. In response to a series of Committee demands for the CIA "family jewels", the 693 page report of possible past wrong-doings compiled by former CIA Director James Schlesinger, the CIA provided first one, then a second "sanitized version." The second contained a page deleted from the first because "it reveals sensitive operative techniques and methods." The entire page was a photocopy of a Jack Anderson newspaper article. (It is true, of course, that newspapers are a source of CIA intelligence information).

#### The "Ellsberg clause"

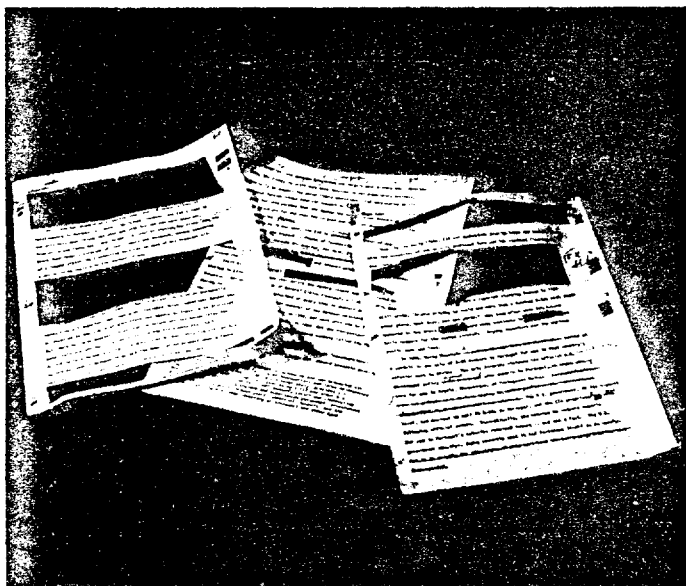
The proposed legislation allows for a court defense that the information was not lawfully classified or designated an "intelligence source or method." But it makes this a question of law for a judge to decide *in camera* (in secret session). This provision, which might be termed the "Ellsberg clause", eliminates a jury determination of the lawfulness of classification, and may well constitute a violation of the Sixth Amendment right to a trial by jury.

Administration spokesmen have claimed that the proposed legislation is not an Official Secrets Act, as it would only affect leakers and not the press. However, the Administration's explanation of the bill explicitly states that "collateral prosecution related to the violation of any other provision of law," is not limited. Thus there is nothing to protect a reporter or editor from being called before a federal grand jury and asked - on threat of jail for contempt

## The "Marchetti clause"

Finally, the Executive Order and proposed legislation both seek to bolster the Executive's authority to enjoin the publication of any information containing "sources or methods." This provision might be termed the "Marchetti clause", for it extends the CIA's successful effort to censor a book co-authored by Victor Marchetti, former assistant to the Director of the CIA. In the Marchetti case, the CIA initially tried to censor 339 items as revealing intelligence "sources and methods." Included in the list were such items as the fact that CIA Director Helms could not pronounce "Malagasy", and that Henry Kissinger was the most powerful man in the "40 Committee" meeting on Chile. In the end, the court sustained the government censorship of 168 items.

## The CIA and the Cult of Intelligence as censored by the CIA



Under the proposed legislation, the Administration would be able to get a temporary or permanent injunction upon showing that "any person is about to engage in any acts or practices which will constitute a violation," while greatly limiting the defendant's right to review the legality of the classification. Moreover, President Ford claims the right to enjoin intelligence officials - even if the law is *not* passed by Congress. The unprecedented assertion that the Executive may legally enjoin officials without a cause of action established by the Congress - a claim founded on national security prerogatives in the Marchetti case - will now be extended to every foreign intelligence agency and official.

Thus at a time when the country is in need of facts about the secret agencies, the Executive branch has issued orders that greatly inhibit the flow of information. White House Counsel Philip Buchen catches the spirit of the Administration in his remark that the Executive Order puts "a real threat over people who can't be controlled by discipline." Senator Church put it another way: the Ford package "gives the CIA a bigger shield and a longer sword with which to stir about." (CBS Evening News, 2/20/76)

## CONGRESSIONAL ACCOUNTABILITY

Virtually all analysts agree that congressional oversight of the intelligence agencies over the past decades has been a failure. The wealth of abuses recently uncovered is itself testament to the failure of the established committees to check Executive activities. The conclusions drawn by the Senate Committee on oversight of CIA activities in Chile can be applied across the board: "The CIA did not volunteer detailed information: the Congress most often did not seek it."

The recent congressional investigations - conducted under the glare of publicity and with the support of a Congress stunned by the secret official illegalities — illustrate the difficulty of oversight in the best of circumstances. The House Committee repeatedly concluded that "If this Committee's experience is any test, intelligence agencies that are to be controlled by Congressional lawmaking are, today, beyond the lawmaker's scrutiny."

These secret agencies have interests that inherently conflict with the open accountability of a political body, and there are many tools and tactics to block and deceive conventional Congressional checks. Added to this are the unique attributes of intelligence - notably "national security," in its cloak of secrecy and mystery - to intimidate Congress and erode fragile support for sensitive inquiries.

— Draft Final Report, House Select Committee on Intelligence, *Village Voice*, February 23, 1976

One substitute for effective oversight has been the occasional instance where individual Congressional representatives feel certain information must be revealed to the American people. Thus, Representative Michael Harrington (D-Mass) exposed the CIA's role in the "destabilization" of the Allende regime in Chile, providing the basis for the House and Senate investigations. Similarly, Senators (as well as Executive officials) played a major role in revealing the extent of the CIA's secret involvement in Angola, leading to the dramatic repudiation of clandestine intervention by the House and Senate. Although Administration spokesmen have condemned both leaks, those matters were clearly subjects fit for public debate and discussion.

### SOUND FAMILIAR?

*"Finally, successful and effective oversight of the foreign intelligence agencies depends on mutual trust between the Congress and Executive."*

President Ford  
Message to Congress  
2/18/76

*"The Nation must, to a degree, take it on faith that we, too, are honorable men devoted to her service."*

CIA Director Richard Helms

Approved For Release 2004/10/12 : CIA-RDP88-01314R000100660021-0 April 14, 1971

President Ford's proposals for congressional oversight define a rather clear return to the traditional role for the Congress — reassuring the citizenry that the agencies are accountable without actually interfering with their activities. The thrust of Ford's design is to keep secrets rather than to provide for effective oversight against abuse, thus co-opting the Congress into the secrecy system.

Ford favors a Joint Committee of both Houses of Congress rather than several committees. By reducing the number of people with the information, Ford seeks to lower "the risks of disclosure." Under Ford's plan, the proposed Joint Committee would not have the right to be fully and currently informed. The President asserts that prior notice of covert action programs abroad - like Angola or Chile - infringes upon his inherent constitutional powers. He also seeks repeal of the Ryan Amendment to the Foreign Assistance Act of 1974 which requires that he inform selected congressional committees in a "timely fashion" about each new covert action program approved by the Forty Committee. Instead, the President proposes to return to the old system of keeping a committee "fully" informed at his discretion.

President Ford also called upon the Congress to create new rules which would establish strict sanctions for leaks - including "leaks" from the Joint Committee to other members of Congress. This provision might be called the "Harrington clause" for it is clearly intended to end acts such as Representative Harrington's exposure of the CIA's program to "de-stabilize" the Allende government in Chile.

Ford also demands an absolute veto on the disclosure of any classified information transmitted to the oversight committee. Despite Congresses' coequal position under the Constitution, the President claims that the separation of powers requires that "no individual member, nor committee, nor single House of Congress" can overrule a classification stamp supported by the President. For the Administration, anything short of a two-thirds vote to release by both Houses of Congress constitutes a "leak."

Perhaps the best indication of the President's attitude toward congressional oversight is found in the proposed secrecy legislation. The bill provides criminal penalties for any bureaucrat who releases information on intelligence "sources and methods" to "unauthorized individuals," including congressional representatives. Under the President's proposed law, a bureaucrat giving information to a Senator could be prosecuted as a felon. Information can be revealed to Congress only in response to a formal request from an authorized committee, and of course, unless the bureaucrat leaks the information, the Committee won't know to ask.

The Administration's clear assumption is that the secrets of the intelligence agencies are more important than the congressional constitutional responsibility to balance the initiative of the Executive. Mitchell Rogovin, Special Counsel to the CIA, has stated that an oversight committee will get secrets "only if the agency is satisfied that the committee can keep secrets." The statement assumes that the Executive can simply ignore the congressional power of inquiry if it is not satisfied with the results. Under such

reasoning the mere presence of a potential critic on an oversight committee - someone the CIA thought could not be trusted - would be reason enough to adopt the "stonewalling" policy which so much frustrated the inquiry of the Pike Committee.

## ACCOUNTABILITY TO LAW

The first premise of the rule of law is that executive officials are personally subject to ordinary law, a proposition which distinguishes the authoritarian from the constitutional polity. Too often in the past, officials acting in the name of "national security" assumed that the limits of law did not apply to their activities.

Nor was this assumption unfounded. For twenty-one years, the CIA and the Justice Department maintained an agreement which enabled the CIA to review any potential prosecution. If the CIA's General Counsel believed that a trial would reveal "highly classified information," the charges would be dropped. In twenty-one years, only twenty cases were referred to the Justice Department for judicial prosecution regarding the CIA. Of these twenty cases, eight were dropped at the CIA's request, for "security considerations," nine were not prosecuted at the discretion of the Justice Department, two cases are currently pending, and only one case resulted in prosecution for improper official conduct. (Letter of 21 July 1975 from John S. Warner, CIA General Counsel, to Kevin Maroney, Deputy Assistant Attorney General). According to the Rockefeller Commission, "none operated as a significant check on CIA's activities." Officials in the Federal Bureau of Investigation were not protected by formal agreement, but as part of the Justice Department, they have enjoyed a similar immunity.

Thus, for twenty years the CIA and FBI ran a mail-opening program which directly violated the explicit provisions of a criminal statute. It is not surprising that one director of that program, James Angleton, former Chief of the CIA's Counterintelligence Staff, felt it "inconceivable that a secret intelligence arm of the government has to comply with all the overt orders (otherwise known as laws) of the government." (*Washington Post*, Sept 24, 1975).

Free from the threat of personal criminal liability, intelligence officials are also spared the possibility of civil litigation. In the past, the classification stamp has prevented many of the targets of illegal agency activities from knowing the source or the causes of the distress. The Rockefeller Commission's conclusion that "since practically all of the CIA's operations are covered in secrecy, few potential challengers are even aware of activities that might otherwise be contested," could apply as well to the victims of the FBI's COINTELPRO operations, or the NSA's cable monitoring program.

The President's reform package made no attempt to correct this imbalance. Faced with clear evidence of massive illegal operations, the President made no mention of plans to prosecute intelligence officials or dismiss those whose illegal acts were immune because the statute of limitations had expired.



That the omission was not an oversight was demonstrated by the Justice Department the day after the President's program was unveiled. Justice Department spokesmen announced that the charges against former CIA Director Richard Helms for a 1971 burglary were being dropped. The Department's attorneys felt they could not prove the requisite "criminal intent," in spite of the fact that the Rockefeller Commission - President Ford's own creation - found that such burglaries were "illegal when they were conducted and would be illegal if done today." Edward Bennett Williams, the attorney for Helms, suggested that dismissal implied that present CIA Director George Bush has the power to engage in similar break-ins, unless specifically prohibited in the future.

*"It is obvious that the public is deeply troubled by the findings of the investigations into the intelligence service . . . The government must move decisively. To avoid charges of a whitewash, it is in the best interests of the Justice Department to disqualify itself in this case. What is vital now is to guarantee a full, thorough and independent investigation. A special prosecutor should be enlisted for this purpose, and given sufficient authority to fully perform the task."*

Senator Frank Church (D-Idaho)  
"Government Adherence to the Law:  
A Call for a Temporary Special  
Prosecutor on Intelligence  
Abuses"

The President opposes congressional calls for a temporary special prosecutor to investigate the past abuses of the intelligence agencies. Attorney General Levi claims that such proposals are an attack on the "integrity" of the Justice Department, yet not one indictment has been returned by the Justice Department. President Ford has also refused to notify the hundreds of thousands of Americans who were the targets of illegal surveillance, so that those affected could protect their own civil rights.

Indeed, it may become one of the sad ironies of this period that the only prosecution which will be brought by the Ford Justice Department will be that of Daniel Schorr, for leaking the House Committee Intelligence Report in "contempt" of Congress.

## EXECUTIVE OVERSIGHT: THE FOX GUARDING THE HENHOUSE

The final check against abuses, and the one given the most attention in the Ford proposals, is internal accountability within the Executive branch. President Ford made it clear that he would be "ultimately accountable," and his package is designed to increase executive autonomy. Yet

## JOB DESCRIPTION FOR A SPECIAL PROSECUTOR

Law	Intelligence Agency Abuses
Conspiracy to } infringe on con- stitutional rights (18 U.S.C. 241)	1st Amendment: CIA, FBI, IRS programs to interfere with peaceful dissent 4th Amendment: CIA, NSA, FBI mail openings, wiretaps, eavesdropping, break-ins
Warrantless } wiretaps (18 U.S.C. 2510)	NSA interception of com- munications Military Intelligence wiretaps of Berlin Democratic Club, FBI taps as part of COIN- TELPRO
Mail openings } (18 U.S.C. 1702 & 1708)	1952-1973 CIA/FBI mail in- tercept program
Burglary, unlaw- } ful entry (state statutes, to be referred to local prosecutors)	CIA burglaries to investigate supposed security breaches, FBI "black bag" jobs
Warrantless } searches (18 U.S.C. 2236)	break-ins without reasonable cause and with malicious intent
Perjury } (U.S.C. 1001)	testimony of CIA Director Richard Helms on Chile and domestic spying before con- gressional committees

most of the abuses of the past were not isolated acts of zealous low-level officials, but on-going programs operated or approved at the highest levels of government. The reforms seem to offer the unblinking proposal that the fox guard the henhouse - that the Executive protect us from the abuses of the secret executive agencies.

According to the Executive Order, illegal or questionable activities within the foreign intelligence agencies are to be reported to "appropriate authorities." For the middle-level bureaucrat faced with an illegal order going to the press or the Congress would invite criminal prosecution under the proposed Official Secrets Act. The only "appropriate authority" is within the executive agencies themselves, the inspectors general or general counsels of each agency. In the past, however, the inspectors general have often responded to illegal programs by producing papers on "potential flap activities," warning the Agency to conceal the abuse. For example, the CIA's Inspector General reviewed the illegal mail-opening program in 1960 and ordered "emergency



"IF I SEE ANY FOXES AROUND, I'LL LET YOU KNOW"



plans" and a "cover story" in the event of disclosure. Similarly, general counsels have often been "can-do" lawyers attempting to find some justification for dubious activities. When CIA General Counsel Lawrence Houston learned of the CIA's assistance to E. Howard Hunt which subsequently was used in the Watergate break-in, he suggested it had not been a violation and need not be referred to the Justice Department for prosecution since he did "not think it was a move by the Agency in the direction of becoming a Gestapo, which is what Congress intended to prevent." (*Inquiry into the Alleged Involvement of the CIA in the Watergate and Ellsberg Matters*, Hearings of the Special Subcommittee on Intelligence of the House Armed Services Committee, July, 1974 p. 39). As Nicholas M. Horrock wrote in the *New York Times* on February 21, 1976, "It was not the Army Inspector General who ferreted out My Lai, nor the Air Force Inspector General who found out about cost overruns in C-5A aircraft development, or the CIA Inspector General who stopped assassination plotting."

According to the President's plan, any information received raising serious questions as to the "legality or propriety" of an activity will eventually be brought to the President's newly created Oversight Board. The Board's initial membership will not inspire the trust of a dissident official. The three Presidential appointees have long histories of protecting the intelligence community, not exposing it. One, Leo Cherne, is an old cold-warrior associated with such right-wing groups as Citizens' Committee for a Free Cuba, the Council Against Communist Aggression, and Citizen's Committee for Peace and Democracy in Cuba.

### THE NEW OVERSEERS

"You could imagine a situation where you have a man in charge of a government or a situation in a foreign country where our American interests are being damaged or subverted or injured one way or another. The thought that by using influence or political means you could eliminate that personality and have him substituted for someone who would be favorable to us I think would be entirely legitimate." (emphasis added)

Robert Murphy, Presidential appointee to the Oversight Board, NBC Nightly News, 2/18/76

"Covert activities conducted outside the United States are not in violation of any existing law that I know of."

Leo Cherne, Presidential appointee to the Oversight Board, NBC Nightly News, 2/18/76

Two other organizations with which he maintains close ties - the International Rescue Committee and Freedom House - both received money from the Kaplan Fund, revealed in 1967 as one of the many foundations used as a conduit for CIA funds. The Chairperson, Robert D. Murphy, 81 years of age, was on the President's Foreign Intelligence Advisory Board during the Bay of Pigs fiasco, the planning of assassination plots against four foreign leaders, the American supported military coup in Brazil, and the covert intervention in Chile's presidential election in 1964. CBS News reported that Murphy once bemoaned the fact that the U.S. had not tried to assassinate North Vietnamese leaders. Although Murphy could not recall making this statement, one wonders what either of these two men would deem "activities that raise questions of legality or propriety."

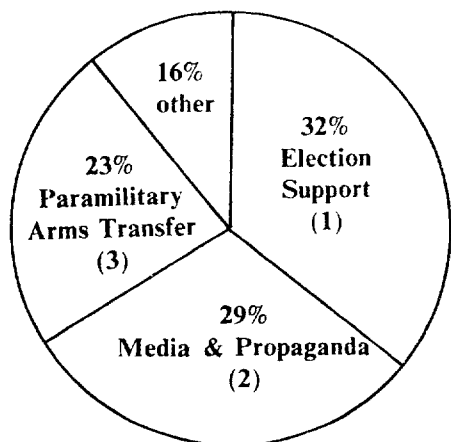
The Board is instructed to report only to the President and the Attorney General, again limiting recourse against abuses approved at the highest levels. Attorney General Mitchell, when told of the mail opening program, reportedly replied he had "no hang ups." If Operation CHAOS had been reported to President Nixon and no one outside the Executive branch, it would still be going on. At a time when 74 percent of the people polled by a Harris survey agreed "it was wrong for the CIA to work out a deal with Mafia characters to try to assassinate Castro," and 61 percent agreed "it was a violation of basic rights for the CIA and FBI to conduct spying on prominent Americans here at home," Ford's proposals for Executive oversight offer little security from future abuses. President Ford assured the American people that there would be no intelligence agency abuses in his administration. We can but take him on his word, for his proposals offer no accountability except trust.

## COVERT ACTION ABROAD: MAKING BRIBES, LIES AND SECRET WARS LEGAL

Announcing that he would not "dismantle the CIA," the President failed to recommend *any* substantive restriction upon covert operations abroad - except a ban on peacetime assassination (previously treated as murder in American law). CIA Director George Bush admitted in response to a reporter from the Los Angeles *Times* that the President's program would "not bar bribery" of foreign officials abroad. Mr. Bush might have added that the program also would not bar kidnapping, extortion, interference in foreign elections, para-military adventure and coup d'etats, or the broad range of other activities which the CIA undertakes overseas.

### WHAT IS COVERT ACTION?

According to the House Select Committee's report, as reprinted in the *Village Voice* on February 16, 1976, covert action abroad falls into the following main categories:



(1) "This is the largest covert action category, and its funding has occurred in large part in the developing countries . . . One Third World leader received some \$960,000 over a 14-year period."

(2) "Activities have included support of friendly media, major propaganda efforts, insertion of articles into the local press, and distribution of books and leaflets."

(3) "The 23 percent approvals in this category from 1965 to 1975 have taken one of essentially four forms: secret armies, financial support to groups engaged in hostilities; paramilitary training and advisers; and shipment of arms, ammunition and other military equipment."

Indeed the President has apparently adopted the position that covert action abroad - the secret interference in another country's internal affairs - is an inherent power of the Presidency. His directive authorizes the CIA to undertake "special activities," defined as secret "activities other than the collection and production of intelligence." The President thus reaffirms his power to order the CIA to do *anything* abroad in secret - other than peacetime assassination.

This claim should be viewed in conjunction with the President's own record on covert interventions abroad. A succession of Presidents have had a rather expansive definition of what clandestine operations are justified in the name of national security, and President Ford is no exception. He personally authorized the covert intervention in Angola and the clandestine funding of political parties in Italy - both considered by the majority of Congress to be secret abuses of the first order. Indeed the Angolan intervention was undertaken in secret in part to finesse any public debate, and, as Secretary Kissinger admitted in his press conference of February 12, 1976, in part because overt assistance was probably illegal under the current American foreign assistance laws.

A major debate is now occurring about the President's power to undertake clandestine activities - ranging from spying to war-making - on his own authority. President Ford's program clearly indicates that he supports a continuation of secret Presidential foreign policy.

### THE RULE OF LAW AND THE KING'S MEN

The opening remarks of the President's public remarks set the tone. One year of intelligence investigations was enough, he told us, just as his predecessor had felt that one year of Watergate was enough. We must not, he stated, become "obsessed" with the past; the over-riding task for the future was to "restore the confidence of the intelligence community."

Taken together, the President's proposals seek to accomplish this by making intelligence officials accountable only to higher orders within the Executive. The issuance of executive orders, secrecy legislation, restrictive oversight provisions - all seem designed to exempt the intelligence agencies from accountability to law.

The legal philosopher, Bernard Schwartz, once defined three fundamental elements of the rule of law: "(1) the absence of arbitrary power; (2) the subjugation of the State and its officers to ordinary law; and (3) the recognition of basic principles superior to the State itself."

The President's proposals should be measured against this standard. His proposals seem to establish the foundations for once again exempting the covert arm of the state from the reach of ordinary law. In the name of reform, the President has recreated the King's Men, a covert executive spying and para-military capacity for use at home and

## DIFFERENT DIRECTIONS

### LEGISLATION PENDING

#### Intelligence Agency Oversight

This resolution (S. Res. 400,) would establish an 11 member permanent Senate Committee on Intelligence Activities with budgetary authority, legislative oversight responsibility, and the authority to release classified information. The President will be required to keep the Committee "fully and currently informed with respect to intelligence activities, including any significant anticipated activities."

#### Special Prosecutor

H.R. 11357, sponsored by Representative Drinan (D-Mass), establishes a temporary Office of Special Prosecution. The Special Prosecutor would be appointed by the President and confirmed by the Senate, with a mandate to investigate and prosecute offenses by federal employees "in connection with or arising out of intelligence on counterintelligence activities or operations." The bill has been referred to the Subcommittee on Criminal Justice of the House Judiciary Committee.

#### Notice to Subjects of Files

Representative Bella Abzug (D-NY) introduced H.R. 12039, requiring the government to inform individuals and organizations who were subjected to surveillance under intelligence programs directed against domestic dissidents that the agency maintains a file on them. The subject of the file will have the option to require that the file be destroyed.

### RECOMMENDATIONS OF THE AMERICAN CIVIL LIBERTIES UNION:

#### Establish

legislative charters for each major agency, all provisions of which are publicly known, and which provide that all activities not specifically authorized therein are prohibited

#### Abolish

- all covert and clandestine organizations
- the use of spies in the collection of foreign intelligence during peacetime
- the Central Intelligence Agency and reconstitute it as the Foreign Intelligence Agency

#### Prohibit

- secret budgets for the intelligence agencies
- the cover-up of criminal conduct

#### Empower

- Congress to release, unilaterally, information classified by the Executive Branch

### RECOMMENDATIONS OF THE HOUSE COMMITTEE ON INTELLIGENCE:

#### Establish

- a standing Committee on Intelligence of the House of Representatives
- a Director of Central Intelligence separate from any intelligence agency to coordinate and oversee intelligence community
- an independent office of the Inspector General for Intelligence to investigate possible or potential misconduct

#### Abolish

- the Internal Security Branch of the FBI
- the Defense Intelligence Agency

#### Prohibit

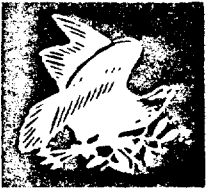
- any covert action unless the DCI notifies the committee within 48 hours stating its nature, extent, purpose, and cost, and the President certifies in writing that it is required to protect "the national security of the United States"
- any agency engaged principally in foreign or military intelligence to directly or indirectly engage in the training or supplying of domestic police agencies
- intelligence agencies' authority to keep secret budgets
- transfer of funds between intelligence agencies
- covert funding of persons associated with religious or educational institutions or members of the media with general circulation in U.S.
- covert publication of books, or the planting or suppression of stories in any journals or electronic media with general circulation in U.S.
- the release (without authorization) of information obtained by the Committee
- assassination except in time of war

#### Empower

- the Committee on Intelligence to release any information or documents in its possession under the following circumstances:
  - 1) vote of a majority of the Members of the Committee
  - 2) if negative vote, a Member of the Committee, with the signatures of one-fifth of the House, can convene the House in secret session for the purpose of informing all members on the question. The House may then vote to release information
- the General Accounting Office to conduct a full and complete management and financial audit of all intelligence agencies, with no limitation by an executive classification system.

#### Limit

- FBI's investigations to those based on criminal prosecution rather than intelligence gathering, and
- inquisition of persons without a warrant.



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